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Competition Law for Developing Countries: A Proposal for an Antitrust Regime in Peru

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Prior to World War II, the United States was the principal country to have a highly developed system of antitrust law. Since that time, most of the developed market economy countries have promulgated some system of laws to protect competition within their economy. While the scope of the substantive rules and procedures within each system remains a topic of heated debate, the idea of a regime of competition laws has gained nearly universal acceptance among developed nations.

There is no similar acceptance of competition law among lesser developed nations. In many instances, the idea of competition laws seems inconsistent with the overriding goal of national economic development. In addition, the system of competition laws which seek to promote the free interplay of market forces may be inconsistent with a national economic system where government regulation or actual ownership of the means of production is substantial.

This Article seeks to persuade that the implementation of a system of competition laws is not inconsistent with the development goals of a nominally market economy of a lesser developed country. Such a system is in fact vital to the development of an effective national economy by subjecting cartel practices and the abuse of a dominant position to legal oversight and review. Such a regime would also prevent the exploitation of monopoly power by both national and international firms.

In order to be effective, such a system would have to be tailored to the needs of each particular economy. While the antitrust laws of the United States or the European Economic Community ("EEC") can serve as a point of departure, they cannot be slavishly duplicated successfully in a lesser developed country. This Article proposes a code of competition law for Peru taking into account the unique circumstances of the Peruvian economy and legal structure. Part I of the Article describes the attributes of developed antitrust systems such as in the United States and

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the EEC. Part II describes the unique, legal, cultural, and economic conditions which confront the drafters of a competition regime for Peru. Part III sets forth the nascent antitrust laws which currently exist in Peru. Part IV describes the abuse of those laws in the regulation of international businesses and part V proposes a model antitrust code for Peru, including the procedures for effectively enforcing such laws.

I. THE ATTRIBUTES OF COMPETITION LAW

Competition law is premised on the belief that a highly competitive market economy can efficiently allocate resources and ensure that consumers will be able to obtain goods and services at the lowest possible prices. Competition law thus seeks to prevent private action which would interfere with these market forces.

Highly developed systems of competition law seem to share three principal attributes. First, competition laws will prohibit, either through civil or criminal penalties, the formation of cartel agreements pertaining to price, production, and the allocation of territories or customers. Second, competition laws will prohibit the actual or attempted abuse of a dominant position or the exercise of monopoly power. Finally, most such systems will also incorporate prophylactic rules aimed at prohibiting market conditions conducive to the formation of cartels or monopolies. Such rules typically include the restriction of certain mergers and the registration of certain agreements between competitors with an appropriate government agency.

In the United States, the first national antitrust legislation was passed in 1890.¹ At that time, the creation of a nationwide market economy was largely complete, and it was widely feared that a series of powerful cartels, or trusts, would exploit their market power to the detriment of both consumers and competitors.² The result was the passage of the Sherman Act. Section 1 of the Sherman Act prohibited all "contract[s], combination[s] in the form of trust or otherwise, or conspiracy in restraint of trade or commerce."³ Section 2 of the Sherman Act prohibited monopolization, attempted monopolization, and conspiracies to monopo-

¹ Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988) [hereinafter Sherman Act].

² P. AREEDA & L. KAPLOW, ANTITRUST ANALYSIS 48-58 (1988).

³ Sherman Act, *supra* note 1, § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

lize a market.⁴

Violations of the Sherman Act may be brought by either the government or by a private plaintiff.⁵ Suits by the government can be either criminal or civil.⁶ Subsequent legislation has increased the penalty such that an individual convicted of a criminal antitrust violation can be imprisoned for up to three years and fined up to one million dollars.⁷ In a civil antitrust suit, a private plaintiff can collect three times the actual damages from a defendant plus the attorneys' fees and costs of the litigation.⁸

In addition to the Sherman Act, the United States Congress in later years passed additional antitrust legislation prohibiting a variety of exclusionary practices such as exclusive dealing,⁹ price discrimination,¹⁰ and mergers which tended to substantially lessen competition within a market.¹¹ Like the Sherman Act, these subsequent acts may be enforced by either the government or a private plaintiff.¹²

Consumer protection law in the United States developed along a different path. At the federal level, general responsibility has been delegated to the Federal Trade Commission ("FTC") to investigate and prohibit unfair methods of competition and unfair and deceptive trade practices.¹³ The FTC carries out its mandate through investigations, in-

⁴ *Id.* § 2.

Every person who shall monopolize, or attempt to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court. *Id.*

⁵ 15 U.S.C. §§ 1, 2, 9, 15(a) (1988).

⁶ *Id.*

⁷ *Id.* §§ 1-2. Pursuant to the recently promulgated Federal Sentencing Guideline, a defendant convicted of a criminal antitrust violation is no longer eligible for a sentence of straight probation, and will ordinarily be sentenced to four to ten months of some form of incarceration.

⁸ *Id.* § 15(a).

⁹ Clayton Act, 15 U.S.C. § 14 (1988) [hereinafter Clayton Act].

¹⁰ Clayton Act, *supra* note 9, § 13.

¹¹ *Id.* § 18.

¹² 15 U.S.C. §§ 1, 2, 9, 15 (1988).

¹³ Federal Trade Commission Act, 15 U.S.C. § 41(3) (1988) [hereinafter Federal Trade Commission Act].

3. Purpose

[The] Federal Trade Commission Act (15 USCS §§ 41 et seq.) was designed to supplement and bolster [the] Sherman and Clayton Acts [citations omitted].

[The] Federal Trade Commission Act was designed to supplement and bolster [the] Sherman and Clayton Acts by enabling [the] FTC to stop in their incipency acts and practices which, when full blown, would violate those Acts [citations omitted].

[The] intent of [the] Federal Trade Commission Act is prevention of injury to [the] general public [citation omitted].

dividual administrative adjudications, and through the issuance of Trade Regulation Rules of general applicability. Other federal consumer protection measures are enforced by the Consumer Products Safety Commission and other executive and independent agencies which regulate specific sectors of the economy, such as the Food and Drug Administration or the Department of Transportation. These federal efforts are supplemented at the state and local levels by consumer protection divisions of prosecutors' offices and consumer fraud and deceptive trade practice statutes which give consumers or competitors a cause of action when injured by such conduct.¹⁴

While certain of these agencies also enforce aspects of United States competition law,¹⁵ their consumer protection responsibilities are handled in a manner distinct from competition concerns.¹⁶ At the federal level, the approach is typically regulatory and relies on administrative processes rather than litigation as the initial fact finding process. More importantly, consumer protection law seeks to protect consumers and

[The] great purpose of both [the] Federal Trade Commission Act and [the] Clayton Act was to advance [the] public interest by securing fair opportunity for play of contending forces ordinarily engendered by honest desire for gain, and to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in conduct of their own affairs [citation omitted].

[The] Federal Trade Commission was created with [the] avowed purpose of lodging administrative functions committed to it in [a] body specially competent to deal with them by reason of information, experience, and careful study of business and economic conditions of industry affected, and was organized in such manner as would give to them opportunity to acquire expertness in dealing with these special questions concerning industry that comes from experience [citation omitted].

[The] Federal Trade Commission Act is [a] measure in which Congress has relied upon [the] initiative of administration officials and flexibility of administrative process to preserve and promote competition, and [the] Commission alone is empowered to develop that enforcement policy best calculated to achieve ends contemplated by Congress [citation omitted].

[The] Federal Trade Commission Act (15 USCS §§ 41 et seq.) was intended to protect not just sophisticated people, but rather that vast multitude which includes [the] ignorant, unthinking, and credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions [citation omitted].

15 U.S.C.S. § 41(3) (Law. Co-op. 1985).

¹⁴ 15 U.S.C. §§ 41-77 (1988). For example, most states have statutes modeled to some degree after the Federal Trade Commission Act.

See, e.g., Illinois Consumer Fraud and Deceptive Business Practices Act, 121 ILL. ANN. STAT. ch. 1211/2, para. 269-270 (Smith-Hurd 1989) (creating private remedy for injunctive relief, actual damages, punitive damages, attorneys' fees, and costs for a wide range of deceptive and unfair acts including conduct constituting a violation of the Federal Trade Commission Act).

¹⁵ For example, the United States Interstate Commerce Commission and the Department of Transportation have the power to approve or deny mergers in the industries subject to their jurisdiction.

¹⁶ For example, the staff of the Federal Trade Commission is divided into separate Bureaus of Competition and Consumer Protection.

competitors from conduct which may have a tendency to deceive as to a material fact without necessarily having any appreciable effect on competition or markets as a whole.

The other principal system of competition law can be found within the EEC. The EEC was founded in 1957 through the implementation of the Treaty of Rome¹⁷ which sought as its primary aim to create a single integrated European market for goods and services. The EEC has expanded from its original six members to include virtually all of the developed market economies in Western Europe.¹⁸ The principal competition provisions of the Treaty of Rome are contained in articles 85 through 90,¹⁹ and have as their principal goal the creation of a transnational European economy without artificial barriers to trade.²⁰ Thus, the role of competition law in the EEC is broader than that in the United States, since it must both protect competition for its own sake and promote the continued integration of national economies.

Article 85 of the Treaty of Rome prohibits agreements, understandings, and concerted practices among firms which have as their purpose or effect the restriction of competition.²¹ In keeping with the goal of continued economic integration, article 85 incorporates an explicit exception

¹⁷ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

¹⁸ The current members of the EEC are: United Kingdom, Republic of Ireland, Netherlands, Belgium, Luxembourg, France, West Germany, Italy, Spain, Greece, Portugal, and Denmark.

¹⁹ Treaty of Rome, *supra* note 17, arts. 85-90. Article 85 prohibits agreements between undertaking which have as their purpose or effect to restrict trade between member states. Article 86 prohibits the abuse of a dominant position within the Community. Article 87 gives the European Commission the power to adopt regulations and directives to enforce articles 85 and 86. Article 90 applies the, general principles of Articles 85 and 86 to public enterprise within the EEC.

²⁰ *Id.*

²¹ *Id.* art. 85, § 1-2. Articles 85 §§ 1 and 2 state:

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;

(b) the limitation or control of production, markets, technical development or investment;

(c) market-sharing or the sharing of sources of supply;

(d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

(e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.

Id.

for agreements among competitors which promote the aims and goals of the EEC without unduly restricting competition.²² Article 86 of the Treaty of Rome prohibits the abuse of a dominant position within the common market.²³ Article 90 of the Treaty of Rome applies these anti-trust prohibitions on a limited basis to enterprises owned by member states.²⁴ While the prohibitions contained in articles 85 and 86 have been

²² *Id.* art. 85 § 3. Article 85 § 3 states:

3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:

- any agreement or classes of agreements between enterprises;
- any decisions or classes of decisions by associations of enterprises, and
- any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:

- (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

- (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Enterprises seeking approval that agreements do not fall within the prohibitions of Article 85(1) and (2) must apply for formal "negative clearance" or an informed letter of comfort from the European Commission. Enterprises seeking approval for agreements pursuant to Article 85(3) must also apply to the European Commission unless the agreement falls within one of the block exemptions issued by the Commission.

²³ *Id.* art. 86. Article 86 states:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in:

- (a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

- (b) the limitation of production, markets or technical development to the prejudice of consumers;

- (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

- (d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

Id.

²⁴ *Id.* art. 90. Article 90 states:

1. Member States shall, in respect of public enterprises and enterprises to which they grant special or exclusive rights, neither exact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular, to those rules provided for in article 7 and in articles 85 to 94 inclusive.

2. Any enterprise charged with the management of services of general economic interest or having the character of a fiscal monopoly shall be subject to the rules contained in this Treaty, in particular to those governing competition, to the extent that the application of such rules does not obstruct the *de jure* or *de facto* fulfillment of the specific tasks entrusted to such enterprise. The development of trade may not be affected to such a degree as would be contrary to the interests of the Community.

applied to joint ventures²⁵ and mergers,²⁶ until recently there has been no explicit regulation relating to mergers currently in force in the EEC.²⁷

Almost all of the major trading partners of the United States have some form of competition law. This includes Canada,²⁸ Great Britain,²⁹ West Germany,³⁰ and Japan,³¹ among others. The principal variations among systems depend on whether the principal source of enforcement lies with a government agency or with private plaintiffs, the use of civil versus criminal sanctions, and the amount of discretion of courts and antitrust enforcers to take into account non-competition issues in making determinations under the relevant national competition laws.

II. THE ECONOMY AND LEGAL SYSTEM OF PERU

The study of antitrust legislation is conditioned by the characteristics of the economy and culture of the society in which the legislation is to be applied. Therefore, a sophisticated political and economic analysis of the activities carried out by the enterprises in a national economy is an important aid in designing competition legislation for that country. Unfortunately, in the case of Peru, there is little detailed research as to the

3. The Commission shall ensure the application of the provisions of this article and shall, where necessary, issue appropriate directives or decisions to Member States.

This doctrine contrasts the antitrust laws of the United States which generally exempt the anticompetitive acts of governmental units.

For instance, states, acting within their sovereign capacity, may regulate agriculture without violating the Sherman Antitrust Act. *See, Parker v. Brown*, 317 U.S. 341 (1943). Furthermore, an entity owned and operated by the United States government is immune from antitrust liability. *See, Sea-Land Air Service, Inc. v. Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982).

U.S. policy is consistent with the United States view that the purpose of competition law is to restrain undue *private* economic power. The broader policy of the EEC in attacking *public* restraints is related to the necessity of creating a true common market free of all restraints which tend to perpetuate national boundaries.

Id.

²⁵ *British-American Tobacco Company Limited and R.J. Reynolds Industries Inc. v. E.C. Commission*, 2 Com. Mkt. L.R. 551 (1987).

²⁶ *Europemballage Corporation and Continental Can Company Inc. v. E.C. Commission* (Case 6/72), 6 Com. Mkt. L.R. 199 (1973).

²⁷ The EEC has considered adopting a merger regulation since the 1970's. The EEC merger regulation finally adopted on December 21, 1989 requires prior notification of transnational mergers where the parties have combined worldwide turnover of approximately \$5 billion and at least two of the parties have a combined turnover within the community of at least \$250 million.

²⁸ G. KAISER, *COMPETITION LAWS OF CANADA* (1988).

²⁹ *See generally*, W. ALLAN & G. HOGAN, *COMPETITION LAWS OF THE UNITED KINGDOM AND REPUBLIC OF IRELAND* (1988).

³⁰ *Federal Republic of Germany*, BV OVERVIEW, *WORLD LAWS OF COMPETITION* (Mathew Bender 1986).

³¹ *See generally*, M. ARIGA, *COMPETITION LAWS OF THE PACIFIC RIM COUNTRIES* (1988).

industrial organization of the Peruvian economy or the extent of significant cartels or firms with dominant positions within Peru.

In general, Peru consists of three regions, an arid coastal strip which supports most of the population, the Andes Mountains which cover more than twenty-five percent of the territory, and the Amazon jungle which covers more than half of the country. Peru is a lesser developed country dependant on agriculture, commodities, and minerals for its principal sources of revenue. Over forty percent of the work force is devoted to agriculture. Per capita income is low, and Peru's modest trade surplus is more than made up by the significant interest and principal payments Peru owes on its foreign debts.

Since the late 1960's, Peru has participated in the Andean Group,³² a common market composed of the principal South American countries.

³² Agreement on Andean Subregional Integration, May 26, 1969, Bolivia, Chile, Ecuador and Peru, 8 International Legal Materials 910 [hereinafter Andean Common Market Treaty].

CHAPTER I

OBJECTIVES AND OPERATIONS

Article 1. The present Agreement has as its goals: to promote a balanced and harmonious development of the Member States, to accelerate this development through economic integration, to expedite their participation in the integration processes as stipulated in the Montevideo Treaty, and to create a climate favorable to the conversion of LAFTA into a common market, all of these designed to secure the progressive improvement of the living standards of the peoples of the Subregion.

Article 2. A balanced and harmonious development must be conducive to an equitable distribution of the benefits resulting from integration of the Member States by effecting a reduction of the existing discriminations that aggravate them. The achievements of the process should be periodically assessed, taking into account, among other factors, its effect on the expansion of global exports of each State, the conduct of its trade balance with respect to the Subregion, the development of its gross territorial product, the generation of new employment, and its capital formation.

Article 3. To achieve the goals set by the present Agreement, the enumerated operations and measures shall be employed, *inter alia*:

- (a) Coordination of economic and social policies, and unification of domestic law in pertinent fields;
- (b) Joint programming, intensified subregional industrialization processes, and execution of Sectorial Programs of Industrial Development;
- (c) Greater acceleration in the trade liberalization program than that adopted generally within the LAFTA framework;
- (d) A common external tariff, attained by progressive stages through a minimum common external tariff;
- (e) Programs directed toward stimulation of development in the agricultural and livestock sector;
- (f) Channelling of resources from inside and outside the Subregion to provide investment financing necessary to the Integration Process;
- (g) Physical integration; and
- (h) Preferential treatment to be accorded to Bolivia and Ecuador.

Article 4. For the better achievement of the present Agreement, the Member States shall undertake the necessary efforts to seek adequate solutions for the problems arising from the land encirclement of Bolivia.

Minor manufactured products are sold to the different member states without the imposition of tariffs. This common market has not resulted in a significant expansion of the Peruvian or Andean economy and has not worked as efficiently as expected.

The Peruvian legal system can be explained in most basic terms as a civil law system based on the Roman and French model.³³ The system is derived from the Roman legal tradition that has been preserved and developed by most of the continental European countries. In the case of Peru, the legal system was heavily influenced by the approximately three centuries of Spanish colonial rule.

The civil law system is based on abstract provisions contained in a organized body of law called the civil code.³⁴ The civil code contains provisions that regulate all aspects of a person's legal relationships from birth to death.³⁵ The civil code usually includes its own rules of interpretation and application, and would cover areas of family law, real property and its transfer, natural and artificial persons, including corporations, torts, contracts, as well as rules of private international law and conflicts of law.³⁶

Code provisions are interpreted and applied to specific legal situations according to the rules and methods of interpretations contained within the code.³⁷ The civil code rules are applied by analogy in the absence of specific provisions covering a particular area or set of circumstances.³⁸ Under such a system, the role of the judiciary is limited to the interpretation and application of the rules contained within the code, rather than the development of judge made precedents familiar to students of the common law.³⁹

Peru uses a civil code based on Napoleonic law as modified by the Peru Civil Code of 1984.⁴⁰ The provisions of the civil code are intended to be of a general and permanent nature and consequently are difficult to

³³ See generally, M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LAW TRADITIONS IN A NUTSHELL* (1985) [hereinafter *COMPARATIVE LAW*]; A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* (1977) [hereinafter *CIVIL LAW*]; J. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1985).

³⁴ J. MERRYMAN, *supra* note 33, at 27-34.

³⁵ *Id.*

³⁶ *COMPARATIVE LAW*, *supra* note 33, at 101-18.

³⁷ *Id.* at 211-32.

³⁸ *Id.*

³⁹ *CIVIL LAW*, *supra* note 33, 567-89. Where codes are silent as to a particular subject and silent as to interpretation, the process of judicial decisionmaking as to legislative intent, may mostly closely resemble a common law jurisdiction.

⁴⁰ *Código Civil* (Edición Oficial) (Ministerio de Justicia 1984) (entered into force November 14, 1984, pursuant to Legislative Decree No. 295).

modify or amend.⁴¹ This is also true for the Peru criminal code,⁴² a separate body of law, also by tradition of a fixed and permanent nature. Any attempt to craft antitrust provisions regulating the conduct of firms and individuals must take into account the rigid provisions of both codes.

III. CURRENT PERUVIAN LAW RELATING TO COMPETITION AND CONSUMER PROTECTION

A. *The Constitutional Framework*

An analysis of the current Peruvian law relating to competition begins with the provisions contained in Title 3 of the Peruvian Constitution governing the economic regime of Peru.⁴³ Title 3 of the Constitution begins with the declaration that Peru will have a social market economy.⁴⁴ The most concrete constitutional provision relating to competi-

⁴¹ There have been only three Civil Codes in modern Peruvian legal history enacted in 1852, 1936 and 1984. The 1984 code was the result of a lengthy struggle prompted by the work of two separate Law Commissions in 1980, and subsequent Commissions in 1981 and 1984. See DELIA REVOREDO DE DEBAKERY, CODIGO CIVIL, ANTECEDENTES, LEGISLATIVOS, COMPARACION CON EL CODIGO DE 1936 (1985).

⁴² The current criminal code entered into force on July 28, 1924. See generally, *Codigo Penal*, *Codigo de Procedimientos Penales*, *Codigo de Ejecucion Penal*, *Reglamento* (Cultural Cuzco, S.A., editors 1986). The Criminal Code has also been subject to recent efforts to revise. See *Comision Revisora de Los Codigos Penal Y Procedimientos Penales*, *El Peruano*, April 11, 1985; *Proyecto de Codigo Penal*, *El Peruano* September 3, 1984.

⁴³ LA CONSTITUCION POLITICA DE PERU (1979) Titulo III, Del Regimen Economico [hereinafter PERU CONSTITUTION I]. Taken from A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (P. Heller translation 1986) [hereinafter PERU CONSTITUTION II].

⁴⁴ PERU CONSTITUTION I, *supra* note 43, arts. 110-11. Artículo 110° - 111° establecido ARTICULO 110°—El régimen económico de la República se fundamenta en principios de justicia social orientados a la dignificación del trabajo como fuente principal de riqueza y como medio de realización de la persona humana. El Estado promueve el desarrollo económico y social mediante el incremento de la producción y de la productividad, la racional utilización de los recursos, el pleno empleo y la distribución equitativa del ingreso. Con igual finalidad, fomenta los diversos sectores de la producción y defiende el interés de los consumidores.

ARTICULO 111°—El Estado formula la política económica y social mediante planes de desarrollo que regulan la actividad del Sector Público y orientan en forma concertada la actividad de los Demás sectores. La planificación una vez concertada es de cumplimiento obligatorio.

See also PERU CONSTITUTION II, *supra* note 43, arts. 110-11. Titulo III Economic Organization Chapter I 110-111 states:

Article 110. The economic system of the Republic is based on principles of social justice oriented to the dignifying of work as the principal source of wealth and as a means for the fulfillment of the human person.

The State promotes economic and social development through an increase in production and productivity, the rational use of resources, full employment, and the equitable distribution of income. With the same purpose it promotes the various sectors of production and protects the interest of consumers.

Article 111. The State formulates economic and social policy through development

tion is article 133 which reads:

"Monopolies, oligopolies, practices and agreements which are restrictive in the industrial and mercantile activities are prohibited. The law assures the normal activity of the market and establishes the corresponding sanctions."⁴⁵

Article 133 incorporates a broad sweeping constitutional prohibition of restrictive business practices. The article does not directly mention restrictive business practices related to services, but such practices most likely would be covered under its provisions relating to mercantile activities. However, the literal language of article 133 cannot be read as to include attempts to monopolize, a practice covered under United States antitrust law.

While this provision is the law of the land in Peru, it only establishes broad parameters which must be enforced through the issuance of regulations. The regulations must be promulgated by the Peruvian legislature or the executive upon delegation from the legislature. To date, no regulations enforcing article 133 have been issued. Unlike the United States, a judge in Peru may not enter a judgment applying this constitutional provision in the absence of the implementing regulations.

Article 133 must also be understood in the context of article 130, which states that all enterprises are "units of production whose efficiency and contribution to the common welfare are demandable by the state, according to the law."⁴⁶ Thus, the Constitution grants the government of Peru broad social welfare powers in the regulation of economic activity.

The enforcement of competition law in Peru is complicated by the traditionally large role of the Peruvian government in the national economy. Article 114 of the Constitution authorizes a broad public sector as well as economic regulation in stating: "For a cause of social interest or national security, the law can reserve for the state productive or service activities. For the same causes the state can establish the reserving of such activities in favor of Peruvian nationals."⁴⁷

plans which regulate the operations of the public sector and orient the activity of the other sectors in concerted fashion. Once it is concerted, the use of planning is mandatory.

⁴⁵ PERU CONSTITUTION I, *supra* note 43, art. 133. Artículo 133° establecido: "Están prohibidos los nomopolios, oligopolios, acaparamientos, prácticas y acuerdos restrictivos en la actividad industrial y mercantil. La ley asegura la normal actividad del mercado y establece las sanciones correspondientes."

⁴⁶ PERU CONSTITUTION I, *supra* note 43, art. 130. Artículo 130 establecido: "Las empresas, cualquiera sea su modalidad, son unidades de producción cuya eficiencia y contribución al bien común son exigibles por el Estado de acuerdo con la ley." PERU CONSTITUTION II, *supra* note 43, art. 130. Article 130 states: "Enterprises, whatever their nature, are production units whose efficiency and contribution to the common welfare may be sought by the State, in accordance with the law."

⁴⁷ PERU CONSTITUTION I, *supra* note 43, art. 114. Artículo 114° establecido: "Por causa dee

The government is particularly active in the regulation of international trade and foreign investment. Article 137 of the Constitution states:

The State authorizes, registers, and supervises direct foreign investment and the transfer of foreign technology as complementary to their domestic counterparts as long as they promote employment, the capitalization of the country, the participation of domestic capital, and contribute to development in accordance with economic plans and the policy of integration.⁴⁸

While this is not a competition regulation *per se*, it necessarily relates to the activities carried out by international and foreign enterprises within the country. Unlike the case with article 133, the powers of the government to regulate foreign investment and technology are spelled out in enforceable regulations.⁴⁹ In addition to the regulations issued under article 137 of the Constitution, the government can also rely on the powers granted to members of the Andean group to regulate foreign investment.⁵⁰

interés social o seguridad nacional, la ley puede reservar para el Estado actividades productivas o de servicios. Por iguales causas puede también el Estado establecer reserva dedichas actividades en favor de los Peruanos." PERU CONSTITUTION II, *supra* note 43, art. 114. Article 114 states that: "For social purposes or national security, the law can reserve for the State production activities or services. For similar reasons the State can also establish limits on said activities in favor of Peruvian citizens."

⁴⁸ PERU CONSTITUTION I, *supra* note 43, art. 137. Artículo 137° establecido: "El Estado autoriza, registra y supervisa la inversión extranjera directa y la transferencia de tecnología foránea como complementarias de las nacionales, siempre que estimulen el empleo, la capitalización del país, la participación del capital nacional, y contribuyan al desarrollo en concordancia con los planes económicos y la política de integración."

⁴⁹ For the text of article 133, see *supra* note 45.

⁵⁰ Andean Common Market Treaty, *supra* note 32, arts. 25-31.

CHAPTER III

COORDINATION OF ECONOMIC POLICY AND DEVELOPMENT PLANNING

Article 25. The Member States shall adopt a strategy for Subregional development based on the following fundamental goals:

- (a) Acceleration of the economic development of the Member States on an equitable basis;
- (b) Increased generation of employment opportunities;
- (c) Improvement in the position of Member States and of the Subregion as a unit in matters of foreign trade and balance of payments;
- (d) Overcoming of infrastructure problems which are presently hindering economic development;
- (e) Reduction in the existing discrimination of development levels among the Member States; and
- (f) Achieving a maximum utilization of scientific and technological progress, and activation of research in these fields.

Article 26. The Member States shall initiate immediately a coordinated procedure in their development planning in specific sectors, and a harmonization of their economic and

B. Legislative Developments

The efforts to develop a legislative framework to implement a system of competition law in Peru date back to 1980.⁵¹ Most competition provisions in Peru are aimed more at consumer protection, rather than competition, goals. Pure competition legislation is almost nonexistent. For example, the 1982 General Industries Law of Peru establishes an office for the defense of consumers within the Ministry of Industry, Tourism and Integration.⁵² While some of the objectives of the law are to

social policies, directed toward future adoption of a concerted planning system for the integrated development of the area.

These processes shall be employed simultaneously and in coordination with the formation of a subregional market, utilizing the following machinery, *inter alia*:

- (a) A system of industrial programming;
- (b) A special system for the agricultural-livestock sector;
- (c) Plans for physical and social infrastructure;
- (d) Coordination of exchange, monetary, financial and fiscal policies, whether use of Subregional capital is to be made within or outside of the area;
- (e) A common trade policy with respect to third countries; and
- (f) Harmonization of planning methods and techniques.

Article 27. Prior to 31 December 1970, the Commission, at the proposal of the Board, shall approve and present for consideration of the Member States, a common system for treatment of foreign capital and, likewise, systems for trademarks, patents, licenses and royalties, *inter alia*.

The Member States pledge themselves to adopt the measures necessary to implement such systems within the six months following approval by the Commission.

Article 28. Prior to 31 December 1971, the Commission, at the proposal of the Board, shall approve and recommend to the Member States a uniform system to govern multinational enterprises.

Within the same period of time, the Commission, at the proposal of the Board, shall issue directives to serve as a guide for the unification of legislation on industrial incentives in the Member States.

The States shall pledge themselves to adopt all measures necessary to implement this unification within the six months following Commission approval.

Article 29. The Commission, at the proposal of the Board, and at the latest by 31 December 1970, shall establish the permanent procedures and machinery necessary to achieve the coordination and unification defined in article 26.

Article 30. The Commission, at the proposal of the Board, shall adopt a program of common instrumentation and machinery to govern foreign trade in the Member States, to be put into effect by the latter prior to 31 December 1972. An exception to the preceding shall be the Common External Customs Tariff which shall be governed by the provisions of Chapter VI.

Article 31. In their national development plans and in the formulation of their economic policy, the Member States shall incorporate those measures required to insure compliance with the preceding articles.

Id.

⁵¹ Decree laws (17) 21411 and 22963. Repealed by Legislative Decree (18) 123 of June 12, 1981.

⁵² Ley General de Industrias, No. 23407, May 28, 1982, reprinted in Tomo 115 Normas Legales (1982).

guarantee competition in the production and sale of goods, the law focuses on compliance with established quality standards and a rigorous protection of the consumer and Peruvian industry against unfair competition.⁵³

The 1981 Legislative Decree No. 133 represents a step toward the creation of a national competition law.⁵⁴ The law imposes criminal sanctions as well as fines on individuals who withhold from the market certain items designated by the government as priority goods.⁵⁵ The law prohibits the withholding of these goods as part of any effort to raise price or limit demand in order to charge supra-competitive prices.⁵⁶ Similarly, article 2 of the decree imposes criminal sanctions and fines on any manufacturer of goods who attempts to sell designated priority items at prices above those set by regulation.⁵⁷ Article 3 of the decree imposes both criminal and civil sanctions on individuals who alter or tamper with the quality, quantity, or measure of designated priority articles.⁵⁸ Article 4 contains provisions for increased penalties for any violations committed at times of civil unrest or public emergency.⁵⁹

However commendable, this law hardly constitutes a national competition regime for Peru. First, the law only applies to certain products designated by the government. Second, the decree prohibits only price increases or the withholding from the market of the designated goods. The scope of this decree is very limited and simply does not deal with free competition and competitive market conditions, but focuses on consumer protection concerns.

In late 1985, the present government issued Supreme Decree No. 467-85-EF.⁶⁰ This is the one law that most closely resembles traditional notions of antitrust and competition law. The passage of this decree is, however, troubling. President Garcia simply issued this decree by executive fiat. The legislature neither considered nor passed any of the provisions contained within the decree. Although the preamble to the decree states that it is necessary to issue provisions to regulate the restrictive business practices of enterprises on behalf of the public interest while the national parliament legislates on the matter, to date the legislature has never considered any such legislation.⁶¹

⁵³ *Id.* arts. 1-C & 1-D.

⁵⁴ Legislative Decree No. 133, June 12, 1981, *reprinted in* Tomo 109 Normas Legales (1981).

⁵⁵ *Id.* art. 1.

⁵⁶ *Id.*

⁵⁷ *Id.* art. 2.

⁵⁸ *Id.* art. 3.

⁵⁹ *Id.* art. 4.

⁶⁰ Published in *El Peruano*, June 11, 1985, *reprinted in* 409 INFORMATIVO LEGAL 492 (Camara de Comercio de Lima November 1985).

⁶¹ *Id.*

The decree declares that it is in the public interest to protect consumers against the abuses derived from enterprises with dominant positions in the market.⁶² The decree defines a dominant position as an enterprise or group of enterprises involved in the production or distribution of products or services that individually or jointly have at least 75% of the market.⁶³ The decree also establishes a regime of regulation for those enterprises found to have dominant positions and requires such firms to report to the government such items as costs of production, commercial and sales costs, financial expenditures and profit margins for their sales and investments.⁶⁴ Such information is to be used by the government to regulate prices for goods and products purchased by consumers.⁶⁵

Under the decree, the Ministry of Economics and Finances establishes prices for firms with a dominant position.⁶⁶ Enterprises that fail to comply with the price regulations can be fined and/or expropriated by the state.⁶⁷ The decree further permits the government to exclude from the scope of the regulations any state industries.⁶⁸

There are significant problems and limitations to this decree. First, the executive has never issued implementing regulations as required by its own decree. Second, despite its preamble, the decree only achieves a small fraction of the goals of free competitive markets associated with antitrust or competition systems. The focus of the decree is limited to the treatment of enterprises with dominant positions in the market without directly addressing the treatment of cartels. While anticompetitive agreements of firms jointly occupying a dominant position would fall within the scope of the decree, there are no concrete provisions dealing with price fixing, limitation of production, or the allocation of territories and customers among competing firms.

The second major weakness of the decree relates to the definition of a dominant position. There appears to be no basis for the selection of 75% market share as the threshold for finding of dominant position. There is no evidence of any kind of economic study preceding the decree that would support the selection of this figure. The 75% threshold when measured against other systems of competition law, appears to be both too high a figure and too inflexible.

Finally, the decree only attempts to regulate the prices of firms with dominant position and does not seek to control or eliminate their market

⁶² *Id.*

⁶³ *Id.* art. 2.

⁶⁴ *Id.* art. 3.

⁶⁵ *Id.*

⁶⁶ *Id.* art. 4.

⁶⁷ *Id.* art. 5.

⁶⁸ *Id.* art. 6.

power or anticompetitive practices. The decree does not even contain a direct prohibition against monopolies or oligopolies as seemingly required by article 133 of the Constitution.⁶⁹

IV. THE NESTLE CASE AND THE ABUSE OF ANTITRUST LAW

The legislative provisions discussed above provided the basis for the principal spectacular, but flawed, application of competition law in Peru. On July 29, 1986, the government issued Supreme Decree 238-86-EF which effectively expropriated the most important milk producing company in Peru and forced the sale of the firm to Peruvian nationals. This extraordinary decree concerned Gloria, S.A., a company incorporated under Peruvian law, which produced evaporated milk. Gloria, S.A. was owned by Perulak, S.A., another company incorporated in Peru, which controlled 100% of the processing and the production of evaporated milk in the country. Perulak was at the time a subsidiary of Nestle, S.A., the Swiss multi-national corporation.

The decree arose out of technical factors which forced Gloria, S.A. to dramatically decrease the production of milk, producing a scarcity in central and southern parts of Peru, especially in the capitol city of Lima. As the shortages grew more acute, the government issued the Supreme Decree which established governmental control over the operations of Gloria, S.A. and required Nestle, S.A. to arrange for the sale of its shares in Perulak to Peruvian persons or enterprises.

The government based the Supreme Decree on the prohibition of monopolies contained in article 133 of the Constitution and on Supreme Decree 467-85-EF.⁷⁰ These decrees and provisions, when taken in combination with article 133 of the Constitution, appear to permit the state to intervene in those enterprises which fail to comply with the terms of decrees designed to protect the consumer against enterprises with dominant positions in the market or with monopoly power. However, the detailed examination of these provisions as stated above, suggest that the *Nestle* case reflects an abuse of executive power under the guise of competition concerns. While article 133 of the Constitution prohibits the existence of monopolies, oligopolies, practices and agreements which may be restrictive of free trade, no regulations currently exist to apply the law to persons within Peru.

Supreme Decree 467-85-EF is also simply inapplicable to the case of Nestle, S.A. and its subsidiaries in Peru. While the decree establishes sanctions and even intervention by the state in the event of a failure to comply with governmental regulations, there is no evidence that Gloria, S.A. or Perulak, S.A. was even subject to the decree.

⁶⁹ See *supra* note 45 and accompanying text.

⁷⁰ See *supra* notes 45, 59-68 and accompanying text.

In order for the decree to have been applicable, evaporated milk must have been placed on a list of items of first priority by the government. In addition, the government would have had to have established price regulations for the sale of evaporated milk. Third, the government would have to have established that Nestle, S.A. and its subsidiary had violated those pricing regulations in order to justify the intervention in the internal affairs of the company. In promulgating the expropriation and forced sale of Nestle, S.A.'s evaporated milk subsidiaries, the government made no showing as to any of these points concerning the violation of Supreme Decree 467.

Moreover, Supreme Decree 238 itself violates several provisions of the Peruvian Constitution. Article 125 of the Constitution guarantees the protection of private property and states that no one can be deprived of property except for purposes of public need in accordance with due process of law and with previous payment of just compensation.⁷¹ Article 126 establishes national treatment for foreigners including both natural and juridic persons for the application of Peruvian law regarding the holding or transfer of property.⁷²

⁷¹ PERU CONSTITUTION I, *supra* note 43, art. 125. Artículo 125° establecido:

La propiedad es inviolable. El Estado la garantiza. A nadie puede privarse de la suya sino por causa de necesidad y utilidad públicas o de interés social, declarada conforme a ley, y previo pago en dinero de indemnización justipreciada.

La ley establece las normas de procedimiento, valorización, caducidad y abandono.

En la expropiación por causa de guerra, de calamidad pública para reforma agraria o remodelación de centros poblados o para aprovechar fuentes de energía, el pago de la indemnización justipreciada puede hacerse en efectivo por armadas o en bonos de aceptación obligatoria y libre disposición, redimibles forzosamente en dinero. En tales casos la ley señala el monto de la emisión, plazos adecuados de pago, intereses reajustables periódicamente, así como la parte de la indemnización que debe pagarse necesariamente en dinero y en forma previa.

PERU CONSTITUTION II, *supra* note 43, art. 125. Article 125 states:

Property is inviolable. The State guarantees it. No one can be deprived of his property except by virtue of public necessity and convenience or public interest, declared according to law, and the previous cash payment of an appropriately appraised indemnity.

The law establishes the norms of procedures, valuation, lapsing, and abandonment of property.

In expropriation on account of war, public calamity, agrarian reform, or the revamping of populated centers or to exploit sources of energy, the payment of an appropriately appraised indemnity can be made through installments or obligatory and freely negotiable acceptance bonds mandatorily redeemable in cash. In such cases the law determines the amount of the issue, adequate terms of payment, periodically readjustable interest, as well as the share of indemnity which must mandatorily be paid in cash and in the previous form.

⁷² PERU CONSTITUTION I, *supra* note 43, art. 126. Artículo 126° establecido:

La propiedad se rige exclusivamente por las leyes de la República.

En cuanto a la propiedad, los extranjeros, personas naturales o jurídicas, están en la misma condición que los peruanos, sin que, en caso alguno, puedan invocar al respecto situaciones de excepción ni protección diplomática.

More to the point, the government in the *Nestle, S.A.* case simply ignored the express limitations of Supreme Decree 467. The decree does not by its own terms prohibit monopolies or oligopolies or create a remedy of divestment.⁷³ It simply establishes a series of regulations concerning the control of monopolies producing goods of first priority.⁷⁴ The failure of Supreme Decree 467 to cover the *Nestle, S.A.* situation, reflects the dangers of utilizing inappropriate legislation without the protections of due process of law to achieve a desired result. It also reflects the need for real antitrust legislation in Peru which can be applied in an even-handed and non-discriminatory manner.

V. A SUBSTANTIVE ANTITRUST CODE FOR PERU

The need for an effective antitrust regime in Peru is vital although the current state of the laws regarding competition is disappointing. The progress toward an effective system of competition laws in Peru has been agonizingly slow. The legislative developments in the past six years have offered little evidence of an effective system concerning restrictive business practices or monopoly power.

There have been two principal deterrents to the development of such a system. The first is a lack of appreciation of the role of antitrust law in providing for the development of the Peruvian economy and national welfare. Public opinion is a vital component of any movement for legislative reform and was crucial in the development of similar competition laws in the United States and the European Economic Community.

The second principal and related impediment to the development of antitrust law in Peru has been the lack of specialized legal and economic knowledge as to the existence and effect of restrictive business practices in Peru. Such a program of economic and legal study would be vital for developing support for the goals of antitrust as well as identifying those factors that are unique to the Peruvian economy and its different mar-

Sin embargo, dentro de cincuenta kilómetros de las fronteras, los extranjeros no pueden adquirir ni poseer, por ningún título, minas, tierras, bosques, aguas, combustibles ni fuentes de energía, directa ni indirectamente, individualmente ni en sociedad bajo pena de perder, en beneficio del Estado, el derecho adquirido. Se exceptúa el caso de necesidad nacional declarada por ley expresa.

PERU CONSTITUTION II, *supra* note 43, art. 126. Article 126 states:

As regards property, foreigners, natural, or juridical persons enjoy the same status as Peruvians without, in any case, their being able to invoke exceptional situations or diplomatic immunity.

However, within 50 kilometers of the borders, foreigners cannot acquire or possess, for any reason, mines, land, forests, waters, fuel or sources of energy, directly or indirectly, individually or collectively, subject to their losing, to the benefit of the state, their acquired right. An exception is made in a case of national need declared by express law.

⁷³ See *supra* notes 59-68 and accompanying text.

⁷⁴ *Id.*

kets.⁷⁵ In particular, such a study is necessary to focus on the geographic divisions within the Peruvian economy as well as those markets with a reduced and limited demand for goods and services which need not be treated in the same manner as those sectors of the economy with diversified and powerful free market forces at work.

Such a study would lay the groundwork for a competition code which would protect the Peruvian economy and consumers from all kinds of restrictive business practices and the abuse of monopoly power. At the same time, such a study would provide the empirical data to establish equitable treatment for small and medium size enterprises or certain segments of the economy that are critical to Peru's developmental needs. Such a study would also be vital for the establishment of the mechanisms and governmental institutions necessary to enforce antitrust law in Peru, and permit Peru to participate in the bilateral and multilateral enforcement of competition law on an international scale. While the development of the precise provisions of a true Peruvian antitrust law must await the conclusion of such a study, certain parameters can be identified in advance and guide the necessary economic research.

A. *Scope of Coverage*

A vital preliminary question relates to the nature of entities that will be subject to any Peruvian system of competition law. In order to be truly effective, any system of competition law must cover both goods and services. In addition, the act must cover the activities of both individuals and enterprise without regard to nationality.

A separate issue relates to the coverage of the act vis-a-vis governmental actions. For both theoretical and practical reasons, any system of Peruvian competition law will have to exclude the acts of the Peruvian government. Since the turn of the century, antitrust law in the United States has been conceived as a restraint on the exercise of private economic power to the detriment of citizens and national ideals.⁷⁶ United States antitrust law specifically exempts activities by the federal government from antitrust scrutiny and severely limits the effect of antitrust on state and local government.⁷⁷ Similarly, the Treaty of Rome limits the liability of states for anticompetitive conduct.⁷⁸ This approach should be incorporated in Peru as an appropriate limitation on antitrust law in general, a practical recognition of the activist role of the Peruvian government in the national economy, and the reality that the national

⁷⁵ The comprehensive economic studies undertaken in the United States in the 1930s similarly established the ground work for effective post-World War II antitrust enforcement.

⁷⁶ See *supra* notes 1-12 and accompanying text.

⁷⁷ See cases cited, *supra* note 24.

⁷⁸ Treaty of Rome, *supra* note 17, art. 90.

government would prevent implementation of any competition law without such an exemption.

B. *Substantive Provisions*

While the objectives of a system of competition law can be easily agreed upon, the specific modes for implementing these goals are not self-evident. In the case of Peru, the objectives of a system of national competition law would be to promote competition, enhance consumer access to a market for goods and services, promote trade and economic development, and limit the abuse of dominant positions in the market.

The broad prohibitions found in United States antitrust law are probably inappropriate in the case of Peru. First, such broad prohibitions, filled in through judicial interpretation,⁷⁹ fit nicely within the common law system. These prohibitions represent the antithesis of a code system where ideally all legal obligations are spelled out in specific provisions of the civil code.⁸⁰ Second, the effectiveness of broad prohibitions in the Peruvian legal system would be undermined by both the lack of confidence in the judicial system and an unwillingness to devote the tremendous amount of resources to the interpretation of competition laws that routinely takes place in the United States, and to a lesser extent in the EEC. In order to be effective, the system of Peruvian competition law must be spelled out in sufficient detail so a limited and strained judiciary can apply new provisions in an even-handed manner, pursuant to the rules of interpretation already in existence for litigation in a civil law system.

Following the approach of the intergovernmental group of experts on restrictive business practices appointed by the United Nations Conference on Trade and Development,⁸¹ a series of specifically prohibited restrictive business practice agreements can be set forth for adoption in Peru. These specific prohibitions would apply to any agreement, written or unwritten, legally enforceable or not, without regard to the location of its execution which have the intent or effect of:

- (a) the fixing of prices of goods or services between competitors;
- (b) collusive tendering or bid rigging among competitors;
- (c) agreements among competitors to allocate markets or customers;
- (d) agreements among competitors to allocate sales and production on a quota basis;
- (e) collective refusals to deal among competitors;

⁷⁹ United States Antitrust Law can be properly characterized as the federalization of the common law of restraint of trade. See generally, P. AREEDA & L. KAPLOW, *ANTITRUST ANALYSIS* 50-51 (1988); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 181-84 (1954).

⁸⁰ CIVIL LAW, *supra* note 33, at 30.

⁸¹ The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices [hereinafter, *Multilateral Principles*].

- (f) collective refusals to supply among competitors;
- (g) collective refusals to permit access to specified facilities essential for competition; and
- (h) agreements fixing the resale price of goods or services.

The above agreements, with the exception of the prohibition against resale price maintenance, can all be characterized as horizontal agreements among competitors. As a starting place for any antitrust system, such agreements represent hard core violations of free competition which typically have no redeeming social value to consumers.⁸² In addition to being supported by the consensus of nations with competition law systems,⁸³ limiting the prohibition of agreements to horizontal collusion among competitors has the advantage of ease of codification and enforceability, which will be vital to the effective enforcement of new competition law.

In addition, resale price maintenance should also be prohibited. Unlike the prohibition against agreements among competitors, the fixing of resale prices is a vertical agreement involving the actions of both a manufacturer and a distributor or retailer. A prohibition against resale price maintenance, while not altogether uncontroversial,⁸⁴ has the benefit of protecting consumers in a country where individual industry segments may typically be dominated by a single seller. In addition, prohibitions against resale price maintenance represent a continuation of the consumerist tradition which has characterized Peruvian antitrust law to date.⁸⁵

In addition to restrictive agreements among competitors, any system of competition law must also restrain the acts of dominant firms which may unilaterally restrict competition. While the American standards of "monopolization"⁸⁶ or "attempted monopolization"⁸⁷ are both too vague for application in Peru, and too costly in terms of the expenditure of resources, the European term "abuse of a dominant position"⁸⁸ can be effectively applied to the Peruvian legal system.

The term "abuse of a dominant position" must however be clearly defined. While the use of presumptions of market power based on market share is not a sophisticated measure of true economic power, such measures may have application in a legal system without the resources to

⁸² United States v. Socomy-Vacuum, 310 U.S. 150, 224, n.59 (1940).

⁸³ Multilateral Principles, *supra* note 81.

⁸⁴ United States commentators are engaged in a lively debate whether resale price maintenance should continue to be *per se* unreasonable, subject to a rule of reason analysis, or presumptively lawful.

⁸⁵ See *supra* notes 51-69 and accompanying text.

⁸⁶ Sherman Act, *supra* note 1, § 2.

⁸⁷ *Id.*

⁸⁸ Treaty of Rome, *supra* note 17, art. 86.

undertake the elaborate measurements of economic power as undertaken in the United States and the EEC. Courts in the United States have themselves adopted the benchmark that 90% market share represents monopoly power, 60% market share might represent monopoly power, and 30% market share was insufficient.⁸⁹ Since the term "abuse of a dominant position" suggests a status in the market somewhat short of monopolization, even a 50% market share could be adopted as a presumption of a dominant position subject to rebuttal by any defendant or respondent. In order to be effective, this benchmark of market power should be applied to both individual firms and firms acting in concert which together possess the necessary market share.

The concept of what constitutes an abuse of a dominant position should also include such unilateral acts as:

- (a) predatory acts against competitors which affect competition;
- (b) unilateral acts of resale price maintenance;
- (c) misuse of intellectual property right to impede either import transactions or sales on the national market; and
- (d) mergers, acquisitions, takeovers and joint ventures among competitors.

The most difficult task will be the development of rules prohibiting an abuse of a dominant position which can be applied with fairness, clarity, and efficiency in a civil law system. Such concerns suggest that Peru opt against antitrust rules involving market structure and emphasize less complicated rules based on prohibiting specific conduct. However, conduct based rules can only lessen, but not eliminate, the need to obtain some measure of market power in prohibiting the abuse of a dominant position. Determining whether a firm has market power, or a dominant position, remains a threshold issue which must be resolved before determining whether any potential abuse of such power or position should be outlawed.

U.S. and EEC law again provide an example to be avoided. Under U.S. law, monopolization and attempted monopolization cases turn into an endless process of discovery and economy analysis in order to define relevant geographic and product markets, to then permit the calculation of a market share of a particular firm.⁹⁰ The relevant market would include not only all firms actually producing a particular product but all firms which could switch production to that product along with foreign firms who could import the product in the event of a substantial price rise.⁹¹ In addition, the United States Supreme Court and the Department of Justice caution that even such a comprehensive calculation of

⁸⁹ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁹⁰ W. HOLMES, 1988 ANTITRUST LAW HANDBOOK §§ 2.01-2.07 (1988).

⁹¹ *Id.*

market share is only the beginning of an examination of all economic factors to determine whether a firm has substantial market power.⁹²

The concept of a dominant position in EEC competition law is defined as a position of economic strength enjoyed by a company vis-a-vis its competitors which enables it to prevent effective competition in a relevant market.⁹³ While not as rigid a concept as "monopoly power," proof of a dominant position still requires analysis of market share data as the beginning of an analysis of a variety of economic factors to determine the existence and abuse of a dominant position in a particular market setting.⁹⁴

Such open-ended provisions are unsuitable for Peru since they defy codification, provide virtually no guidance to the business community or government, and are prohibitively expensive to enforce.

There are more workable rules which nonetheless achieve the purpose of determining whether a firm is sufficiently powerful where its actions run a very real risk of injuring consumers. Sales and census data when applied on a "line of business" basis provide a rough measure of market share in many industries. Such data combined with a presumption of 50% market share as a dominant position would identify with some measure of specificity those firms prohibited from undertaking certain specified business practices because of the likelihood that such conduct would constitute the abuse of a dominant position.

While such an approach does not purport to reflect economic precision, it does purport to set forth intelligible standards and rules so that the business community and the government can plan in advance its conduct with an understanding of the law. While such rules may not yield results which would always please an economist, they are replacing a system where there are effectively no rules at all.

C. *Enforcement Mechanisms*

Competition rules are rarely self-executing. Violations are often done secretly and are well-concealed. Competition law must be enforced by some party with the resources and expertise to investigate and prosecute violations of the law.

Antitrust enforcement in the United States is split between the Department of Justice and the Federal Trade Commission. The Department of Justice has exclusive authority to prosecute criminal violations of

⁹² Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447 (1986); United States v. General Dynamics Corp., 415 U.S. 486 (1974); United States Department of Justice Merger Guidelines, issued June 14, 1982, revised June 14, 1984.

⁹³ U. TOEPKE, EEC COMPETITION LAW 65-96 (1982); See generally, D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 288-321 (1980).

⁹⁴ *Id.*

the antitrust laws and possesses civil authority to investigate and prosecute other anticompetitive practices.⁹⁵ The Federal Trade Commission was created in 1914 to assist in the enforcement of the antitrust laws as well as to investigate and enforce a variety of laws aimed at consumer protection and fraudulent business practices.⁹⁶ In addition, private lawsuits may be brought by any party injured in its business or property by an antitrust violation.⁹⁷

Enforcement of EEC competition law rests primarily with the Commission of the European Communities. The Commission has broad powers to investigate and prosecute violation of EEC law.⁹⁸ While no criminal sanctions for competition violations exist in the EEC, companies and individuals may be fined up to ten percent of annual sales.⁹⁹ EEC competition law may also be enforced by private plaintiffs within their own national legal system and compensatory damages for violation of EEC competition law may be available through the national courts as well.¹⁰⁰

It is most unlikely that Peru will ever adopt such elaborate enforcement mechanisms. Even with recent cutbacks, the United States employs approximately 550 persons in the Antitrust Division alone.¹⁰¹ In the European Commission, Directorate General IV employs 274 persons to enforce the competition provisions of the Treaty of Rome.¹⁰²

This is a burden that Peru cannot and should not bear. A much smaller number of lawyers within the Ministry of Justice could develop the expertise necessary to bring test cases enforcing the key provisions of the new law.

Government cases would, by necessity, be supplemented by private lawsuits. Such suits would be in the nature of tort actions where a business or consumer would have been injured by a violation of the law. No government, regardless of resources, can investigate, let alone prosecute, all the complaints it receives from persons alleging a violation of law. A

⁹⁵ Sherman Act, *supra* note 1, §§ 1, 2, 9, 15(a).

⁹⁶ *Id.* §§ 41-58.

⁹⁷ *Id.* § 15.

⁹⁸ Regulation 17/62 J.O. 1962, 204, O.J. 1959-62, 87 [hereinafter Regulation 17].

⁹⁹ *Id.* arts. 15(2) and (3).

¹⁰⁰ *Garden Cottage Foods, Ltd. v. Milk Marketing Board*, 2 All E.R. 770 (1983) (discharge of injunction in action under European Economic Community Treaty, Article 86, on grounds that adequate remedy in damages available).

¹⁰¹ Statement of Charles F. Rule, Assistant Attorney General, Antitrust Divisions Before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives concerning the Antitrust Division's Fiscal Year 1989 Authorization, March 3, 1988. This figure would not include personnel at the Federal Trade Commission and other federal agencies with competition responsibilities.

¹⁰² Written question No. 1615/86 by Mr. Francois Roelants du Vivier (ARC-B) to the Commission of the European Communities (March 17, 1987).

private right of action is necessary to allow a victim of anticompetitive conduct to seek relief where the government cannot or will not take action.

Allowing private lawsuits will not in all likelihood result in any great burden to the judiciary. Unlike the United States, the civil code would not permit treble damages or contingency fees to attorneys nor does the Peruvian System permit extensive pretrial discovery which U.S. litigants often utilize in the hope of uncovering a violation in antitrust litigation. The lack of such incentives, the less litigious nature of the Peruvian legal system, and the expense and delay of any litigation suggests that a new Peruvian competition law regime would not generate a large volume of frivolous claims. Instead, such a system can remedy blatant anticompetitive conduct that is not currently subject to any effective prohibition or regulation.

It is unlikely that Peru could or should adopt criminal penalties for anticompetitive agreements. It would be extremely difficult to amend the criminal code of Peru to incorporate such penalties. The only current criminal sanction for conduct arguably related to competition is Legislative Decree 133. Legislative Decree 133 covers only the speculation in certain goods and illegal storage of goods to raise market prices.¹⁰³ This provision does not provide a legal base for the application of such provisions to traditional anticompetitive conduct given the constitutional and legal principles in Peru that criminal laws are not to be applied by analogy.

Nor is there the political will to amend the criminal code to provide provisions more broadly applicable to anticompetitive conduct. While the enactment of the criminal portions of the Sherman Act in the United States occurred in a context of strong public awareness of the effects of restraints of trade and support for criminal sanctions, such a situation does not exist in Peru. Nor are the Constitutional principles of free commerce and competition as absolute or strong in Peru as in the United States. Unlike the Commerce Clause of the United States Constitution, Peru, in contrast, declares in its constitution the establishment of a "social market economy" in which other factors from market principles are elevated to constitutional importance. Without such broad popular support for criminal penalties, Peruvian competition law, as in the EEC, will remain a matter of civil penalties and fines.

CONCLUSION

Peru, like any developing nation committed to a market economy, can benefit from an effective system of competition law if properly tai-

¹⁰³ See *supra* notes 54-59 and accompanying text.

lored to the needs of the national economy. The country's fragile economy can ill afford the additional burdens and inefficiencies imposed by the restricted output and higher prices imposed by cartels and individual firms with substantial market power. Neither can the country afford the drain of an additional and costly layer of bureaucracy or the costs of lengthy and uncertain litigation.

Peru's current regime of competition laws represent an incomplete step in this direction. As currently drafted, these laws are effective on paper only. The laws lack implementing regulations and have been applied in a highly discretionary and inconsistent manner.

These weaknesses are not surprising in view of the fact that laws are basically aimed at consumer protection concerns and cannot function effectively as antitrust laws. The existing laws must be supplemented with a set of true competition laws aimed at the control of market power. Formal and informal agreements between competitors with respect to price, quantity, and allocation of territories or customers must be prohibited. Similarly, the abuse of a dominant position by dominant firms against the interests of consumers and competitors must similarly be restrained.

The challenge is to devise a system whose costs are not so prohibitive where the cure may be worse than the disease. Peru must reject the worst excesses of both the United States and the EEC systems. While each system works reasonably well within its own setting, neither is appropriate for Peru. The United States system embroils its litigants in lengthy and expensive court proceedings which can last decades and involve complex economic principles which cannot be applied with certainty in advance of litigation. The European system involves a cumbersome bureaucracy reviewing the registration of all agreements raising competitive concerns. The EEC system by necessity involves a prohibitively expensive government investigation, litigation and delays of years for an applicant to receive formal approval for proposed business conduct.

Both of these systems are simply too complex, too expensive and time-consuming to serve Peru's interests in further developing competition law. Peru must develop rules which can be applied by a small staff of government prosecutors in significant test cases and private litigants as part of the framework of private commercial law. A Peruvian competition law as outlined above represents a new approach to an old problem and an opportunity to contribute to the stability and development of the Peruvian economy.†

† By agreement, the *Journal* has relied on the authors for the Peruvian law sources not available in the United States.